83-1061

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FILED
DEC 27 1983
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court Of The United States

October Term, 1983

CATALYTIC, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 136,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Section 7 of the National Labor Relations Act protects an economic striker from discharge by an employer acting in good faith without unlawful animus, when the striker admitted making an unlawful animus, ing telephone call to the wife of the non-striking employee, and when such call was not made from the picket line, not as part of any concerted activity, and not in the course of any effort to persuade a non-striking employee to join the strike.

2. Whether Section 10 (c) of the National Labor Relations Act precludes the National Labor Relations Board from ordering the reinstatement of an economic striker who was discharged without unlawful animus for an admitted unlawful act directed at the home of a non-striking fellow employee.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Record Citation	iv
Citation to Opinions Below	1
Jurisdiction	2
Applicable Statutory Provisions	2
Statement of the Case	3
Reasons for Granting the Writ of Certiorari –	
I. The Eleventh Circuit's Adoption Of The NLRB Standard That Verbal Threats, Short Of A Direct Threat Of Immediate Physical Harm, Lose The Protection Of The Act Only When Accompanied By Physical Acts Or Gestures Presents A Conflict Among The Circuit Courts Of Appeals; Departs From The Accepted Course Of Judicial Proceedings By Failing To Follow Controlling Precedent; And Raises A Significant Issue Concerning The Rights Of Non-Striking Employees To Be Free From Fear And Intimidation.	6
II. The "Protective Mantle" Placed By The NLRB And The Eleventh Circuit Over Unlawful Misconduct Directed At Non-Strikers Is Fundamentally Inconsistent With Section 7 Of The Act.	12

TABLE OF AUTHORITIES

Cases: *Page*

Associated Grocers of New England v. NLRB, 562 F.2d 1333 (1st Cir. 1977) 7

Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) 8

Firestone Tire & Rubber Co. v. NLRB, 449 F.2d 511 (5th Cir. 1971) 7, 8

NLRB v. Burnup & Sims, 379 U.S. 21 (1964) 9

NLRB v. First National Maintenance Corporation, 452 U.S. 666 (1981) .....

NLRB v. Moore Business Forms, 574 F.2d 835 (5th Cir. 1978) 8

NLRB v. McQuaide, Inc., 552 F.2d 519 (3rd Cir. 1977) 7

NLRB v. Transportation Management Corp., ____ U.S. 113 LRRM 2857 (June 15, 1983 11

NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) 9

Southern Steamship Company v. NLRB, 316 U.S. 31 (1942) 8

Woodcraft Division/Georgia Kraft Company v. National Labor Relations Board and Laborers' International Union of North America, AFL-CIO, Local 246, 696 F.2d 931 (11th Cir. 1983), cert. granted ____ U.S. ____ (1983) 6

Statutes:

28 U.S.C. § 2101 (c) 2

28 U.S.C. § 1254 (1) 2

29 U.S.C. § 157 2

29 U.S.C. § 158 (a) (1) 2

29 U.S.C. § 158 (a) (3) 2

29 U.S.C. § 160 (c) 2

29 U.S.C. § 160 (e) 2

29 U.S.C. § 160 (f) 2

RECORD CITATION

This petition involves issues arising out of the Eleventh Circuit Court of Appeals' enforcement of an order of the National Labor Relations Board. The transcript and exhibits of the initial administrative hearing were certified to the Eleventh Circuit Court of Appeals as Volumes I and II of the Offical Record, and are cited in this petition as follows:

"T" refers to the Official Hearings Transcript (Vol. 1 of the Record on Appeal, No. 82-7357).

"GC" refers to the General Counsel's Exhibits received in evidence at the hearing (Vol. II of the Record on Appeal, No. 82-7357).

"RX" refers to the Company's exhibits received in evidence at the hearing (Vol. II of the Record on Appeal, No. 82-7357).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Catalytic, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is an unpublished opinion and is reprinted in the Appendix at page A6.[1] The Decision and Order of the National Labor Relations Board

[1]References to the opinions below are designated by "A", followed by the appropriate Appendix page number.

("NLRB") and the decision of the Administrative Law Judge ("ALJ") are reported at 264 NLRB No. 154. The NLRB's decision is reprinted in the Appendix at pages A-7 through A-9, and the Decision and Supplemental Decision of the ALJ are reprinted in the Appendix at pages A-10 through A-24 respectively.

JURISDICTION

The Court of Appeals ordered enforcement of the NLRB Order on August 19, 1983. The petitioner's petition for rehearing and suggestion for rehearing en banc was denied on September 28, 1983. This Petition for Writ of Certiorari was filed within ninety (90) days of that date, in accordance with 28 U.S.C. § 2101 (c) and Rules 20.2 and 20.4 of the Rules of the Supreme Court of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

APPLICABLE STATUTORY PROVISIONS

As provided by Supreme Court Rule 21.1 (f), the verbatim quotation of the following provisions of the National Labor Relations Act ("Act") (29 U.S.C. § 151 *et seq.*) are set forth in the separately bound Appendix hereto.

1. Section 7 of the Act (29 U.S.C. § 157);
2. Section 8 (a) (1) of the Act (29 U.S.C. § 158 (a) (1));
3. Section 8 (a) (3) of the Act (29 U.S.C. § 158 (a) (3));
4. Section 10 (c) of the Act (29 U.S.C. § 160 (c));
5. Section 10 (e) of the Act (29 U.S.C. § 160 (e)); and
6. Section 10 (f) of the Act (29 U.S.C. § 160 (f)).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The issues involved in this Petition arise from an economic strike against Catalytic, Inc. by Local 136 of the International Brotherhood of Electrical Workers in the fall of 1980. At the conclusion of the strike, a contract was executed and all strikers with the exception of Philip Lang and Samuel Thrash were reinstated. These two strikers were suspended, and later terminated, based on Catalytic's belief that such strikers had engaged in misconduct. The Union filed charges against Catalytic alleging that Catalytic had violated §§ 8(a) (1) and 8(a) (3) of the Act by discharging Strikers Lang and Thrash for misconduct during the strike.

After a one-day hearing, the Administrative Law Judge held that Striker Lang had in fact not committed misconduct of which he had been accused, and that Striker Thrash (notwithstanding his guilty plea in state criminal proceedings), had not engaged in misconduct so serious as to warrant denying him the protection of the Act. [A-14—A-24]. Catalytic took exceptions to the decision of the ALJ, on several grounds including the ALJ's acknowledged failure to consider the brief filed by Catalytic. The NLRB issued an Order Remanding Proceeding To Administrative Law Judge, dated February 11, 1982 [A-12], directing the ALJ to consider Catalytic's brief [A-12—A-13], and the ALJ then issued his Supplemental Decision stating, inter alia, that he had considered Catalytic's brief but reaffirmed each of his prior findings and conclusions [A-10—A-11].

Catalytic again took exceptions to the NLRB, and the NLRB on Catalytic's second exceptions issued a Decision and Order finding the same violations as the ALJ [A-7—A-9]. Apanel of the Eleventh Circuit enforced the NLRB's

order and denied Catalytic's petition for review in a *per curiam* opinion dated August 19, 1983 [A-6]. The Eleventh Circuit subsequently denied Catalytic's request for rehearing and suggetion for rehearing en banc on September 28, 1983 [A-5].

B. Background of Company and Union

Catalytic's Wilsonville, Alabama facility is a pilot plant for solvent-refined coal, a fuel intended to avoid certain environmental problems encountered with the use of coal. The economic strike in August, 1980, was Catalytic's first strike, and involved a unit of approximately 75 employees. IBEW Local 136 was the only union representing employees at Catalytic's Wilsonville facility. Catalytic conducted a three shift operation and continued such operation until the economic strike ended on September 17, 1980.

C. The Striker Misconduct Issue

Catalytic discharged Striker Thrash on September 11, 1980, as a result of Thrash's identification as a party responsible for a harassing telephone call made to the home of non-striking employee Sanford Simon. On an afternoon when non-striking employee was working at the Catalytic plant, Striker Thrash placed a call from his home to the home of non-striking employee Sanford Simon. When Diane Simon (wife of the non-striking employee) answered the telephone, striker Thrash did not identify himself, but said "you God damned bitch" and hung up the phone.[2] Because the Simon home had received precious anonlmous threatening telephone calls, Sanford Simon had arranged

[2]Striker Thrash admitted the telephone call, but said he merely said "bitch" without adding the profane expletive; the ALJ credited Diane Simon's version of the conversation [A-16 n. 2].

to have such calls traced. This call was traced to Thrash's home, some two blocks away.

Sanford Simon contacted the local police, and swore out a complaint against Thrash, who was arrested on September 9, 1980. Catalytic Plant Manager Harry Lewis discharged Thrash solely for the unlawful harassing telephone call [A-20].

Striker Thrash later pled guilty to the charge against him. The ALJ found, as Thrash admitted, that Thrash had made the telephone call, and credited Diane Simon's version of the call [A-16 n.2,]. The ALJ found that Catalytic discharged Thrash on account of that unlawful call, and the ALJ did not find any unlawful animus or other unlawful motive for Thrash's discharge [A-20]. In fact, the ALJ noted the absence of any unfair labor practice on Catalytic's part [A-20]. The TLJ did find, however, that Thrash's unlawful act was not sufficiently serious to deprive Thrash of the "protective mantle" of the Act [A-21].[3]

The NLRB, after requiring the ALJ to consider Catalytic's brief (as a result of Catalytic's first exceptions) later upheld the ALJ's Supplemental Decision that Catalytic violated §§ 8(a) (1) and 8(a) (3) by discharging and declining to reinstate Thrash for his admitted unlawful act. Neither the ALJ nor the NLRB at any time held that Catalytic had an unlawful motive, or that Thrash's discharge resulted from anything other than Catalytic's good faith belief that striker Thrash had in fact engaged in such misconduct.

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[3]The other striker denied reinstatement, Philip Lang, was credited by the ALJ in his denial that he had engaged in the misconduct for which he had been terminated [A-21]. This Petition does not address Lang's discharge or the subsequent order of reinstatement.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Adoption Of The NLRB Standard That Verbal Threats, Short Of A Direct Threat Of Immediate Physical Harm, Lose The Protection Of The Act Only When Accompanied By Physical Acts Or Gestures Presents A Conflict Among The Circuit Courts Of Appeals; Departs From The Accepted Course Of Judicial Proceedings By Failing To Follow Controlling Precedent; And Raises A Significant Issue Concerning The Rights Of Non-Striking Employees To Be Free From Fear And Intimidation.

A. The Eleventh Circuit Here, As In *Georgia Kraft*, Accepted The NLRB Standard That A Striker's Verbal Misconduct Is Protected, In Conflict With Other Courts Of Appeals.

As in *Woodkraft Division/Georgia Kraft Company v. National Labor Relations Board and Laborers' International Union of North America, AFL-CIO, Local 246*, 696 F.2d 931 (11th Cir. 1983) cert. granted ..... U.S. ..... (1983), (hereafter "Georgia Kraft") this case presents the significant problem of protection of non-strikers' rights when the NLRB presumes that the "protective mantle of the Act" extends to verbal misconduct unless, in the opinion of the NLRB, such misconduct is accompanied by acts or gestures so serious as to deprive the employee of the protection of the Act.

The Eleventh Circuit accepted the NLRB presumption that all activity by an economic striker is protected, whether or not it is concerted, and whether or not it is specifically protected by § 7, unless the NLRB considered the activity to be serious misconduct. The NLRB has in fact drawn a distinction between verbal misconduct and other forms of misconduct, and has treated verbal misconduct as non-serious and, therefore, as protected by the Act, unless verbal misconduct is accompanied by acts or gestures.

The Eleventh Circuit's acceptance of the NLRB holding that Thrash was entitled to reinstatement because his misconduct was not sufficiently serious conflicts with the decisions of those other Courts of Appeals that strikers could be discharged for threatening verbal misconduct unaccompanied by acts or gestures The First Circuit in *Associated Grocers of New England v. NLRB*, 562 F.2d 1333 (1st Cir. 1977) and the Third Circuit in *NLRB v. McQuaide, Inc.*, 552 F.2d 519 (3rd Cir. 1977) adopted an objective standard that threats which reasonably instill fear of bodily harm or reasonably intimidate are not protected by § 7.

The Eleventh Circuit's predecessor Fifth Circuit, in *Firestone Tire & Rubber Co. v. NLRB*, 449 F.2d 511 (5th Cir. 1971) denied enforcement to *Firestone Tire & Rubber Company*, 187 NLRB 54 (1970), (a decision on which the ALJ relied) while explicitly rejecting the NLRB characterization of specific conduct as non-threatening and not sufficiently serious to warrant discharge of a striker.

Striker Thrash's unlawful harassing telephone call reasonably intimidated the Simons because of the context in which it was received. Such an anonymous expression of anger carried an unequivocal message to the wife of a non-striker that someone who bore her ill-will because her husband was working during the strike knew where she lived, and knew when she was home alone. The Simons considered the call serious enough to warrant the filing of a complaint with the police.

As in *Georgia Kraft*, the critical issue underlying the Eleventh Circuit decision is that the NLRB may extend the "protection" of the Act to verbal misconduct because the NLRB considers such verbal misconduct not to be threatening.

B. The Eleventh Circuit Failed To Follow Controlling Precedent.

1. The Eleventh Circuit disregarded binding Fifth Circuit precedent, apparently in favor of its own recent *Georgia Kraft* decision, as to which certiorari has been granted.

The Fifth Circuit had not accepted the NLRB presumption that verbal misconduct unaccompanied by acts or gestures is non-serious. See *Firestone Tire & Rubber Co. v. NLRB*, 449 F.2d 511 (5th Cir. 1971). Although the Eleventh Circuit was bound by *Firestone*, *see Bonner v. City of prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), the *Georgia Kraft* decision did accept that principle and apparently was the basis for the *per curiam* enforcement in this case.

2. The Eleventh Circuit failed to consider precedent of this Court that unlawful activity is unprotected.

The Eleventh Circuit's decision conflicts with a significant precedent because it permits the NLRB to treat unlawful conduct as protected conduct despite this Court's decision to the contrary. Striker Thrash's call was a crime. This Court has previously held in *Southern Steamship Company v. NLRB*, 316 U.S. 31 (1942) that the NLRB is not authorized to declare unlawful acts to be "protected activity." In *Southern Steamship*, the NLRB held that acts of mutiny, crimes under 18 U.S.C. §§ 292 and 293, were "protected activity". See 316 U.S. at 36. Not surprisingly, this Court reversed:

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently, the entire scope of Congressional purpose calls for careful

> accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

316 U.S. at 47.

This Court reiterated that unlawful activity is unprotected activity in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962).

It was not striker Thrash's participation in the strike that caused his discharge; it was an independent unlawful act away from the picket line, not in concert with anyone, and without any protected purpose. An act in those circumstances simply should not be presumed to be protected, and the decision of the Eleventh Circuit that the NLRB was supported by sufficient evidence that Tharsh's misconduct was not "sufficiently serious" to deny him protection of the Act conflicts with controlling precedent because it fails to consider that the NLRB may not determine unlawful activity in these circumstances to be "protected" by the Act.

3. The Eleventh Circuit endorsed the NLRB's misapplication of *NLRB v. Burnup & Sims.*

The Eleventh Circuit accepted without discussion the NLRB's misapplication of the decision of this Court in *NLRB v. Burnup & Sims,* 379 U.S. 21 (1964). The ALJ announced during the hearing that the appropriate legal standard was that enunciated in *Burnup & Sims,* and the case was tried on that theory. *Burnup & Sims* held that an employer could be held responsible for a violation of the Act for discharging an employee in the good faith but mistaken belief that the employee had engaged in misconduct. The order of proof established by *Burnup & Sims* as follows:

> . . . In sum, § 8 (a) (1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that *the employee was not, in fact, guilty of that misconduct.* (Italics supplied).

379 U.S. at 23.

There was no evidence that Catalytic acted in bad faith or for any proscribed motive. The only evidence of Catalytic's motive, was that it had a single, lawful motive, in discharging Thrash because of his conduct of which it believed him to be guilty. In a *Burnup & Sims* situation (*i.e.*, where the employer acts in a good faith belief that an employee engaged in misconduct) it is the responsibility of the General Counsel to demonstrate not merely that the employee was engaged in protected activity and the employer should have known of it, but also that the employee was not in fact guilty of such misconduct. (See the ALJ's decision at A-20). Such a burden of proof is fundamental where there is no evidence of an unlawful motive.

Striker Thrash's discharge must be distinguished from cases in which an unlawful motive can be proven, and from cases in which disproportionate punishment gives rise to an inference that the stated reason for discipline is a pretext for unlawful discrimination. There was no evidence that Catalytic acted for an unlawful motive, or that Catalytic's motive was anything other than what was stated.

In the absence of an unlawful or mixed motive, the proper inquiry is whether the employee was in fact innocent. If an employee is found to be innocent, a *Burnup & Sims* violation is established; but if the employee is not innocent, there is no basis to extend the "protective mantle" of the Act to preclude good faith discipline.

This Court's decision in *NLRB v. Transportation Management Corp.*, ... U.S. ....., 113 LLRM 2857 (June 15, 1983) upheld the Board's *Wright Line* test[4] that an employer could rebut the General Counsel's showing of anti-union animus contributing to a discharge, if the employer proved in a "mixed motive" or "dual motive" situation. If the employer demonstrated by a preponderance of the evidence that the worker would have been fired even if he had not been involved with the Union. This creates a substantial anomaly, because there is no dispute that Thrash would have been discharged for that act, whether or not a strike was present, and since the General Counsel made no showing that any unlawful motive contributed to the discharge.

The decision of the Eleventh Circuit to ignore the question of employer motive entirely, was inconsistent both with proper application of *Burnup & Sims*, as well as the *Wright Line* test approved in *NLRB v. Transportation Management Corporation*.

The function of review exercised by the Eleventh Circuit on the NLRB's petition for enforcement under § 10 (e) of the Act, and under § 10 (f) of the Act as to Catalytic's petition for review was to apply the law, and not simply to defer questions of the law to the NLRB as it would defer questions of fact. The decision of the Eleventh Circuit enforcing based on "substantial evidence" simply ignores the necessary review of the legal standard applicable to Thrash's discharge.

---

[4]*Wright Line*, 251 NLRB 1083 (1980), enforced 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

II. The "Protective Mantle" Placed By The NLRB And The Eleventh Circuit Over Misconduct Directed At Non-Strikers Is Fundamentally Inconsistent With Section 7 Of The Act.

Thrash's misconduct which is at the heart of this case was clearly directed at infringing upon rights guaranteed a non-striker by Section 7 of the Act. Section 7, by its plain terms, affords the same protection to the right not to strike as it does to the right to strike. The NLRB, and the Eleventh Circuit, gave no consideration to the fact that Thrash's unlawful act was directed at the home of a non-striker precisely because the non-striker exercised his Section 7 right not to strike.

The concept that striker misconduct directed at non-striking employees should be tolerated unless "serious" necessarily implies that the Eleventh Circuit and the NLRB have established protection under the Act for non-serious misconduct directed at non-strikers. The Act neither explicitly, nor by necessary implication, subjects non-strikers to misconduct at the hands of strikers, simply to protect the right to strike. The failure of the Eleventh Circuit and the NLRB to reconcile the rights of strikers to strike with that of non-strikers to be free from any mis- not to strike is a grave misinterpretation of Section 7. This Court should not permit it to continue.

In Thrash's case, based on his own admission, he committed an unlawful act because Sanford Simon was working while Thrash was not. Thrash's act was not provoked either by Catalytic or by Simon; it was not part of an altercation at the picket line; and Thrash offered no justification whatsoever.

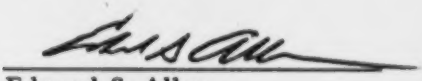
In these circumstances, to enforce the NLRB's order compelling Thrash's reinstatement with back pay is to con-

done a violation of Sanford Simon's Section 7 rights, and this Court should not permit it.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,



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APPENDICES A-G TO PETITION

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CONTENTS

Page

APPENDIX A A-1

APPENDIX B A-6

APPENDIX C A-8

APPENDIX D A-9

APPENDIX E A-12

APPENDIX F A-14

APPENDIX G A-16

APPENDIX A

Statutory Provisions Involved

29 U.S.C. § 157

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title.

29 U.S.C. § 158

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

• • • • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the repre-

sentative of the employees as provided in section 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

29 U.S.C. § 160

* * * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without

back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided, further*, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organizational national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect

to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-7357

CATALYTIC, INC.,
Petitioner, Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent, Cross-Petitioner.

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 19, 1983, 11 Cir., 198__, ___ F.2d ___).
(September 28, 1983)

Before TJOFLAT, JOHNSON and HATCHETT, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the mem-

bers of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ GERALD BARD TJOFLAT
United States Circuit Judge

APPENDIX C

Opinion of the United States Court of Appeals,
Eleventh Circuit, August 19, 1983

CATALYTIC, INC.,
Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent, Cross-Petitioner.

No. 82-7357
Non-Argument Calendar

Petitions for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Before TJOFLAT, JOHNSON and HATCHETT, Circuit Judges.

PER CURIAM:

The National Labor Relations Board's factual findings are supported by substantial evidence in the record, and the Board has correctly applied the law to those facts. We therefore affirm the Board's conclusion that Catalytic, Inc. violated section 8 (a) (3) and (1) of the National Labor Relations Act by discharging employee Thrash and by suspending and then discharging employee Lang for engaging in strike misconduct that was not sufficiently serious to remove them from the protection of the Act, and the Board's remedial order.

ENFORCED.

APPENDIX D
264 NLRB No. 154

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CATALYTIC, INC.
and
I.B.E.W., LOCAL UNION 136

Case 10—CA—16250

DECISION AND ORDER

On October 20, 1981, Administrative Law Judge Hutton S. Brandon issued the attached Decision in this proceeding. Thereafter, on February 11, 1982, pursuant to the exceptions filed by Respondent, the Board remanded this proceeding to the Administrative Law Judge for consideration of Respondent's brief and issuance of a Supplemental Decision.[1] On April 16, 1982, the Administrative Law Judge issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision and Supplemental Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

[1]Due to an interim local office move by the Atlanta Branch of the Division of Judges and the apparent failure of the United States Postal Service to forward Respondent's timely mailed brief to the Branch's new office, the Administrative Law Judge's original Decision was issued without benefit of considering Respondent's post-hearing brief.

[2]Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Catalytic, Inc., Wilsonville, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.[3]

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overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In adopting the Administrative Law Judge's findings with respect to the suspension and discharge of Lang, we find it unnecessary to consider or adopt the Administrative Law Judge's findings concerning the statutory implications which might or might not arise if Lang had in fact thrown rocks or similar objects at nonstriking employees. Inasmuch as the Administrative Law Judge found that Lang in fact did *not* throw such objects, a finding which we adopt herein, we decline to speculate as to the disposition of hypothetical circumstances not before us in this proceeding.

With respect to the discharge of Thrash, we fully agree with the Administrative Law Judge that Thrash's strike-related behavior, while not to be condoned, did not rise to the level of misconduct so violent or serious as to render him unfit for further service. Thus, the evidence establishes that Thrash's misconduct was limited to a single, brief, anonymous telephone call which, while profane and vulgar, contained no threats of any kind and, as Respondent acknowledges in its brief, was not violent in character. Moreover, although Thrash's call was not the first call of its kind received at the home of the nonstriking employee during the strike, there is no contention that Thrash was responsible for, or even aware of, these previous calls, and thus there is no basis to conclude that Thrash's call was related to or part of any plan of harassment directed at nonstriking employees. In these circumstances, we find it unnecessary to compare Thrash's conduct, as did the Administrative Law Judge, with the qualitatively distinct sequence of gestures and remarks made in the physical presence of a nonstriking employee and his family which arose in *The Firestone Tire & Rubber Company*, 187 NLRB 54 (1970).

[3]In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

Dated, Washington, D.C. September 30, 1982.

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

Robert P. Hunter, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
ATLANTA, GEORGIA

CATALYTIC, INC.
and
I.B.E.W., LOCAL UNION 136

Case 10–CA–16250

Glenn M. Price, Esq., of Birmingham, AL, for the General Counsel.
John Richard Carrigan, Esq., (Balch, Bingham & Baker), of Birmingham, AL, for the Respondent.
James Mullinex, Jr., for the Charging Party.

SUPPLEMENTAL DECISION

HUTTON S. BRANDON, Administrative Law Judge: On February 11, 1982, the Board remanded this proceeding for reconsideration in light of a brief which had been previously filed by the Respondent but not received by the undersigned.[1] I have reviewed the record, argument and

[1]The failure to receive the brief can be attributed to the United States Postal Service, since the Respondent's brief had been mailed sufficiently in advance of the due date to provide a reasonable expectation that it would have been timely received. And while the effort to deliver may have been complicated by an interim local office move by the Atlanta Branch of the Division of Judges, the Postal Service had been given timely notice of the move and provided with appropriate forwarding information including the correct new address. In the record herein, the parties were also advised by me of the new office address. Unfortunately, the record incorrectly reflected the address as "244 Broad Street" rather than as stated by me "to 44 Broad Street."

authorities relied upon by the Respondent for its contention that the Respondent had not violated Section 8 (a) (3) and (1) of the Act as alleged in the complaint in the suspension and discharge of Phillip Lang and the discharge of Samuel D. Thrash, Jr. In my decision which issued on October 20, 1981, I found that Lang and Thrash were in fact unlawfully discriminated against as alleged. The Respondent's arguments in its brief are largely duplicative of those made through the remarks of counsel at the hearing. Accordingly, a lengthy discussion here, of the evidence and issues on remand would be repetitive and unnecessary. Having fully considered the Respondent's brief,[2] I am persuaded to nothing more than the validity of my initial findings of fact and recommended conclusions of law in this case. I therefore find no reason to change my prior conclusions in the initial decision.

Accordingly, I adhere to my original decision.

Dated at Washington, DC April 16, 1982.

/s/ HUTTON S. BRANDON

Hutton S. Brandon
Administrative Law Judge

[2]The Respondent's brief notes that a case cited by the General Counsel in support of his position with respect to the discharge of Thrash, *The Firestone Tire and Rubber Company*, 187 NLRB 54 (1970), had been denied enforcement, *Firestone Tire & Rubber Co. v. N.L.R.B.*, 449 F.2d 511 (5th Cir. 1971). It is sufficient to note that the cited case was considered by me only for its analogical value and not as controlling in Thrash's case. Moreover, and in any event, while the court's decision is the law of that case, the Board's decision therein is reflective of its position in cases of like nature and I am bound to that position. *Insurance Agents International Union, AFL-CIO (The Prudential Insurance Company of America)*, 119 NLRB 768 (1957).

APPENDIX F

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CATALYTIC, INC.
and
I.B.E.W., LOCAL UNION 136

Case 10—CA—16250

ORDER REMANDING PROCEEDING TO ADMINISTRATIVE LAW JUDGE

On October 20, 1981, Administrative Law Judge Hutton S. Brandon issued his Decision in the above-entitled proceeding. Thereafter, Respondent filed exceptions and a supporting brief, General Counsel filed an answering brief to Respondent's exceptions, and Respondent filed a supplemental memorandum.

At the close of the hearing, the Administrative Law Judge informed the parties that briefs would be due in the Atlanta branch of the Division of Judges on September 30, 1981, and stated the address of the Atlanta branch as 275 Peachtree Street, N. E. The Administrative Law Judge also informed the parties that the Atlanta branch would be undergoing a move to a new address, perhaps before the due date for briefs, but incorrectly stated that the new address was 244 Broad Street rather than the correct address of 44 Broad Street. On September 28, 1981, Respondent mailed its brief by certified mail to 275 Peachtree Street, N. E. On October 19, 1981, the brief was returned by Respondent by the United States Postal Service as unclaimed. That same day, Respondent advised the Atlanta branch of the Division of Judges that the brief had been returned and would be resubmitted, which Respondent promptly did on the following day, October 20, 1981. However, without apparent consideration of Respondent's

brief, the Administrative Law Judge's Decision issued on October 20, 1981. In the interim between the close of the hearing and the due date for briefs, the Atlanta branch of the Division of Judges moved its offices to 44 Broad Street.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having duly considered the matter, the Board issues the following.

IT IS HEREBY ORDERED that the above-captioned proceeding be, and it hereby is, remanded to Administrative Law Judge Hutton S. Brandon for the purpose of reading and considering Respondent's post-hearing brief.

IT IS FURTHER ORDERED that the Administrative Law Judge shall, after consideration of the Respondent's brief, prepare and serve on the parties a Supplemental Decision setting forth all necessary findings of fact, conclusions of law, resolutions of credibility, and recommendations with respect to the unfair labor practices alleged in the complaint as the Administrative Law Judge finds necessary having given due consideration to the Respondent's brief. Copies of such Supplemental Decision shall be served on all the parties after which the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, shall be applicable.

Dated, Washington, D. C., February 11, 1982.

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

Robert P. Hunter, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX G

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
ATLANTA, GEORGIA

CATALYTIC, INC.
and
I.B.E.W., LOCAL UNION 136

CASE 10-CA-16250

Glenn M. Price, Esq., for
the General Counsel.
John Richard Carrigan, Esq.,
(Balch, Bingham & Baker),
of Birmingham, AL, for
the Respondent.
Mr. James Mullinex, Jr.,
for the Charging Party.

DECISION

Statement of the Case

HUTTON S. BRANDON, Administrative Law Judge: This case was heard on August 26, 1981, at Birmingham, Alabama. The charge was filed on September 16, 1980,[1] by I.B.E.W., Local Union 136, herein called the Union, and amended on October 16. The complaint issued on October 27 and alleged that Catalytic, Inc., herein called the Company or the Respondent, violated Section 8(a) (3) and (1) of the National Labor Relations Act, as amended, herein called the Act, by suspending its employee Phillip Lang on September 10, and by discharging its employees Samuel D. Thrash, Jr. on September 11 and Phillip Lang on September 29. The

[1]All dates are in 1980 unless otherwise stated.

issue presented is whether Lang and Thrash had engaged in misconduct during the course of an economic strike against the Respondent which would deprive them of the protection of the Act to which they would otherwise be entitled by virtue of their participation in a legitimate strike.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the arguments of the General Counsel and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent is a Delaware corporation with an office and place of business located at Wilsonville, Alabama, where it is engaged in coal conversion research. During the calendar year preceding issuance of the complaint the Respondent purchased and received at its Wilsonville, Alabama place of business goods valued in excess of $50,000 directly from suppliers located outside the State of Alabama. The complaint alleges, the Respondent admits, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint further alleges, the Respondent by its answer admits, and I further find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. *Material Facts*

The Union was certified as the collective bargaining representative of certain of Respondent's employees in November 1979. Negotiations for a collective bargaining agreement covering the unit employees began in December 1979. The negotiations were unsuccessful and during the latter part of August the Union engaged in an economic strike against the Respondent. While the record does not reflect the degree

of support the strike received from unit employees, it is clear that some unit employees continued to work during the strike. It is further clear that Samuel D. Thrash, Jr., hereafter called Thrash, and Phillip Lang, hereafter referred to as Lang, engaged in the strike.

The strike ceased on September 17 and the employees offered to return to work. All were reinstated with the exception of Thrash and Lang. It is undisputed that by certified letter dated September 11, Thrash was advised by the Respondent that he was terminated. The letter, signed by H. E. Lewis, plant manager, gave no reason for the termination. Lang, while he was not immediately reinstated upon conclusion of the strike, was advised telephonically by his supervisor, Blair, during the latter part of the week in which the strike ended, that he was suspended. He subsequently received a letter from the Respondent dated September 23 stating that he was suspending pending further investigation for misconduct on September 10. By letter dated September 29 signed by Lewis, the Respondent advised Lang that it had completed the investigation of Lang's "actions" during September and as a result it was terminating him for misconduct.

The Respondent's position is that Thrash was discharged and Lang was suspended and subsequently discharged because each engaged in misconduct during the course of the strike and that by engaging in such misconduct, they had stepped beyond the protection of the Act. The General Counsel contends that no misconduct occurred and that even if it did, it was not sufficiently egregious or flagrant to remove them from the protection of the Act.

There is little conflict in the evidence as to the misconduct attributed to Thrash. Thrash conceded that as a result of being generally upset over the strike and the fact Simon was working while Thrash was not, on August 30 he telephoned the home of Sanford Simon, an employee of the Respondent who was continuing to work during the strike. Simon's wife, Diane, a former employee of Respondent, answered the tele-

phone and Thrash, without identifying himself, uttered the word "Bitch" and hung up.[2] Simon, having earlier received a number of harassing and threatening telephone calls about August 27 had a telephone tap and tracer put on his line prior to Thrash's call. With this capability, a trace was placed on Thrash's call and it was ascertained that the call emanated from his number. Thrash was arrested on September 9 for making a harassing communication.

Thrash subsequently pleaded guilty to the offense and was fined $110. While, as indicated, Simon had received other harassing telephone calls, there was no evidence to establish that Thrash was responsible for them. There was also no evidence that Thrash's call was part of a general plan or conspiracy of harassment of the Simons. Only one other harassing call was received at Simon's home after the trace efforts were initiated, and while the trace was incomplete, it was ascertained that the call came from a vicinity distant to Thrash's home.

The evidence with respect to Lang's alleged misconduct is more in dispute. Lewis testified that Lang was discharged for three incidents of rock throwing at cars of nonstrikers at the picket line. According to Lewis, he had reports that Lang had thrown rocks at the cars of Ed Lachut, Tom Runions and Ronald Ammons all on September 10. To support its position with respect to Lang's actions, the Respondent presented Runions and Ammons as well as striking employee Horace Mann and Maurice Turgeon, an instrument engineer and supervisor for the Respondent.

Runions testified that a day or two prior to September 10, while he was in the process of passing through the picket line in his car, Lang had asked him how it felt to be a "scab." Runions replied, "Well, I'm getting paid for it," to which Lang responded, "Yeah, you're going to pay for it." Subse-

[2]Mrs. Simmons was called as a witness by the Respondent and testified that Thrash had said, "You God damned bitch." The profanity adds little to the epithet. Mrs. Simon appeared very sincere in her testimony, and I accept her version that Thrash did utter the additional words she attributed to him.

quently, on September 10 after Runions passed through the picket line in his car and proceeded about 20 feet down the highway he heard something strike his car. He testified he had observed Lang on the side of the road standing by a truck, and it was at the point he passed Lang when he heard his car being struck. He immediately pulled over to the side of the road and stopped his car. Although he inspected his car, he could find no evidence of any damage, or having been hit. While he discussed the incident with some police who drove up to the scene, he did not advise them that Lang had thrown anything at him although he testified that a friend and neighbor of his, Eddy Vickery, who was at the scene with striker Horace Mann, had told Runions that Lang had thrown something.

Vickery did not testify herein.[3] Mann testified that he was sitting in a truck with Vickery one day at the picket line. He observed Lang beside the truck and testified Lang "acting like he throwed a rock," but conceded he did not "see the rock or anything." Mann related that a car stopped "down the road" following the incident, but he could not identify Runions as being the driver of the car or the person involved in the incident.

Turgeon testified that on the evening of September 10 as he was proceeding through the picket line at the plant entrance following by some 25 yards the car of Ed Lachut, he observed Lang step out of the group of picketers and throw an object at Lachut's car. Turgeon admitted that he could not state with certainty what was thrown, for he saw more of a "blur" than a specific object. In any event, Turgeon conceded that Lachut's car did not appear to take any evasive action. There was no contention that Lachut's car

[3]Vickery's unsworn written statement given to the Respondent was received in evidence as providing a basis for the Respondent's action in discharging Lang. Resp. Exh. 4. The statement which related that Lang had thrown a rock at Runions car was not received for the truth of the matter asserted therein and no reliance had been placed on the statement in this regard in reaching the conclusions herein.

sustained any damage or that it had been hit by any object. Lachut who did not testify was apparently unaware of the incident. Although Turgeon testified that plant accountant Julius Frit was with him at the time he observed Lang, Frit did not testify and there is no evidence that he saw Lang throw anything.

Ronald Ammons testified that on the morning of September 10 as he was driving through the picket line area, he observed from his rearview mirror Lang step out from the group of picketers and make a "motion as though he was throwing something at the car." Ammons admitted he did not actually observe any object in Lang's hand and conceded that his car was not hit by anything or damaged in any way.

Lang testified for the General Counsel and emphatically denied throwing rocks at any cars during the strike and specifically denied throwing rocks at the cars of Runions, Lachut and Ammons. On cross-examination he broadened his denial to include the throwing of any objects of any kind at cars. He conceded, however, that on September 10 when Runions was leaving the plant, Lang was walking to his vehicle to put up his "pliers" which he had utilized to repair lanterns used by the pickets. As Runions passed, Lang raised his hand with the pliers and waived it "like a protest" while yelling "you scab." Lang observed Runions pull over to the side of the road some 20 or 30 feet beyond Lang. He denied that he heard anything strike Runions' car. Finally, Lang denied making any motions toward other nonstrikers similar to the motion he had made toward Runions, but he was not questioned regarding whether he made throwing motions at the cars of Lachut and Ammons.

B. *Analysis and Conclusions*

The Respondent's evidence indicates that on three different occasions on September 10, Lang was seen engaged in the appearance of making a throwing motion. Lang concedes that he may have appeared to be throwing something on one of the occasions. Yet, the fact remains that no

Respondent witness was able to state with any certainty that Lang actually threw an identifiable object. Turgeon's testimony comes closest to establishing that an object was hurled by Lang, but still he could not ascribe any specific appearance to the object and concedes he just saw a blur. The vagueness of Turgeon's testimony makes it suspect, and its reliability is further questionable since he could not even recall which hand Lang was "throwing" with. Accordingly, because I found Lang's denials that he threw anything at any cars to be sincere and convincing, I find he did not throw any objects at the cars as suggested by the Respondent's witnesses. Moreover, had Lang been inclined to throw objects at cars which were crossing the picket line with an intent to inflict damage, it is likely he would have accomplished such a purpose. The cars were vulnerable and close by the pickets as they crossed the picket line and turned onto the highway. It is difficult to perceive how Lang, if bent on damage sufficient to dissuade nonstrikers from coming back across the line, could have missed the vehicles. Yet, two cars he allegedly threw at were not hit and one which was claimed to have been hit revealed no evidence of having been hit after close examination.

By his own admission, on one occasion Lang did make a motion which could have given the appearance of throwing something, and this apparently gave rise to fellow striker Mann's testimony that Lang acted like he threw something. In view of this, and absent a specific denial by Lang that he did not make throwing motions at Lachut's and Ammons' cars, I conclude that he did make such throwing motions without actually throwing anything. Therefore, in this regard, I credit the testimony of Turgeon and Ammons that they observed Lang make throwing motions on September 10.

Turning to the law to be applied to the facts as found above with respect to Thrash and Lang, it is well established that the Act grants employees the right to engage in concerted activities for the purpose of collective bargaining or

other mutual aid or protection. The right to engage in such concerted activity includes the right to strike and to picket. As the Board said in *Coronet Casuals, Inc.*, 207 NLRB 304, 305 (1973):

> It is true, of course, that not all forms of conduct literally within the terms of Section 7 and 13 remain entitled to statutory protection. In deference to the rights of employers and the public, the Board and the courts have acknowledged that serious acts of misconduct which occur in the course of a strike may disqualify a striker from the protection of the Act. Thus, strikers have been deemed to lose the Act's protection when they seized the employer's property, or engaged in acts of "brutal violence" against a nonstriker. At the same time it is true that not every impropriety committed in the course of a strike deprives an employee of the protective mantle of the Act. Thus, absent violence, the Board and the courts have held that a picket is not disqualified from reinstatement despite participation in various incidents of misconduct which include using obscene language, making abusive threats against nonstrikers, engaging in minor scuffles and disorderly arguments, momentarily blocking cars by mass picketing, and engaging in other minor incidents of misconduct. . . . Each striker's eligibility for reinstatement must be judged solely upon incidents in which the striker in question is alleged to have participated. . . . Upon proof that strike misconduct on the part of a particular striker has occurred, the burden of proving the innocence of the striker shifts to the General Counsel who, in order to gain reinstatement for the striker, must show that the conduct was not sufficiently serious to justify the employer's refusal to reemploy the striker in question. [Citations omitted.]

In the instant case I am satisfied that the Respondent's actions with respect to Thrash and Lang were based on a good faith belief that they had engaged in misconduct. The Respondent was not shown to have harbored any animosity against employees because of their union activity. Nor was there any unfair labor practice history which would tend to suggest ulterior motivations on the Respondent's part.

Moreover, statements were made to the Respondent to warrant its belief that misconduct on the part of Thrash and Lang had taken place. The only point relied on by the General Counsel to show an absence of good faith was the Respondent's failure to interview Thrash and Lang prior to taking discharge action. I conclude the failures to interview either Thrash or Lang regarding their misconduct did not establish an absence of good faith on Respondent's part in view of the statements and information it had at the time of the suspension and discharges. I conclude, therefore, that the burden shifted to the General Counsel to establish the innocence of Thrash and Lang. *N.L.R.B. v. Burnup and Sims, Inc.*, 379 U.S. 21 (1964); *Rubin Bros. Footwear, Inc.*, 99 NLRB 610 (1952).

The General Counsel cannot seriously contend that Thrash did not engage in misconduct, for Thrash admitted his telephone call to Mrs. Simon and the uncomplimentary remark directed at her. Moreover, Thrash's misconduct must be evaluated in the absence of any unfair labor practices on the Respondent's part in inducing the dispute or resulting in prolongation of the strike, a circumstance frequently found by the Board to be a mitigating factor. See, e.g. *Coronet Casuals, Inc., supra.*

Thrash's call to Mrs. Simon cannot be regarded as totally innocuous, but neither can it be regarded as "threatening." While the apprehension of the Simons over Thrash's call is understandable in light of other threatening and harassing telephone calls, such other calls could not be attributed to Thrash. Thus, the legitimacy of his discharge under the Act must be premised on the one call. Thrash's language to Mrs. Simon was certainly not that the of "victorian parlor," but, as already noted, it was not in in itself threatening. While not to be condoned, Thrash's call to Mrs. Simon as well as the language he used was, in my opinion, insufficient to remove him from the protective mantle of the Act. The test to be applied in determining the disqualification for reinstatement in such situations is whether the conduct was "so

violent and of such serious character as to render the employee unfit for further service."[4] The fact that Thrash's actions may have violated a state law regarding telephone usage has no impact upon the test to be applied in the instant case for such law has its own sanctions or penalties. Here, although telephonically and anonymously communicated, Thrash's remark was no worse than that of the two strikers considered by the Board in *The Firestone Tire and Rubber Company*, 187 NLRB 54 (1970), cited by the General Counsel. There it was found that two strikers who directed obscenities and vulgarities to a nonstriker, his wife and child were not deprived of the Act's protection by such conduct. Accordingly, and in the absence of evidence that his call was part of a general conspiracy of threatening or harassing calls, I conclude that Thrash's misconduct was insufficient to warrant his discharge and that by his discharge, the Respondent violated Section 8(a)(3) and (1) of the Act.

With respect to the actions of Lang, I have found that he did not in fact throw objects at nonstrikers' cars as claimed by the Respondent. I have found, however, that he did engage in actions or motions which gave the appearance that he was throwing at the nonstrikers. Even so, it does not appear that Lang made such motions so as to intimidate the nonstrikers, to threaten them or to cause them to loose control of their cars. Indeed, neither Runions nor Lachut claimed to have observed Lang's throwing motions, and Ammons only saw such a motion through his rearview mirror. Under these circumstances, I am persuaded that Lang's conduct falls far short of that degree of violent behavior of such a serious nature as to render him unfit for future employment service.[5] Accordingly, I conclude that Lang's conduct was not sufficiently serious to justify his discharge even when considered in light of the fact that the

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[4] *N.L.R.B. v. Illinois Tool Works*, 153 F.2d 811, 815-816 (7th Cir. 1946); *Terry Coach Industries*, 166 NLRB 560 (1967).

[5] *Terry Coach Industries, supra.*

strike was purely economic in nature and unprovoked by any unfair labor practices by the Respondent.

Even assuming, as contended by the Respondent, that Lang did throw an isolated rock or similar object at a non-striker in a car, Board law seems to indicate that such conduct, although reprehensible and not to be condoned, is insufficient to deprive him of protection of the Act where no damage as a result of such conduct has been shown. Thus, in *Southern Florida Hotel & Motel Association, et al.*, 245 NLRB 561 (1979), cited by the General Counsel in his argument, the Board found the accurate throwing of a rock by a striker at a taxicab which did not damage the cab or impair the driver's ability to control the car's course did not constitute sufficiently serious misconduct to justify the striker's discharge even in the context of a purely economic strike. Rather, the Board characterized the conduct as "the type of impulsive, minor misbehavior that can be expected during the course of a lengthy and tense strike." *Id.* at 564. It would thus appear that in the instant case even if Lang threw something at one of three cars on one day during the course of a three week strike which was otherwise unmarked by any violence and no damage was done, he should not be denied protection of the Act. Here, as in *Southern Florida Hotel & Motel, supra*, in none of the alleged rock throwing incidents was it shown that the driver's ability to control the car's course was impaired or that the driver was otherwise endangered. Accordingly, I conclude that assuming that Lang had engaged in the misconduct attributed to him, under the circumstances here, such misconduct was insufficient to deprive him of the protection of the Act and warrant his discharge. By suspending him and discharging him, I conclude that Respondent violated Section 8(a) (3) and (1) of the Act as alleged in the complaint.

Upon the foregoing findings of fact and the entire record in this case, I make the following:

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By suspending Phillip Lang on September 23, 1980, and by discharging him on September 29, 1980, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. By discharging its employee Samuel D. Thrash, Jr. on September 11, 1980, the Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act, I shall recommend that it cease and desist therefrom and affirmatively take such action as will dissipate the effects of its unfair labor practices.

Having found that Phillip Lang was unlawfully suspended and subsequently discharged and that Samuel D. Thrash, Jr. was unlawfully discharged, I find it necessary to order Respondent to offer them full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings suffered by them as a result of the Respondent's unlawful actions. Loss of earnings shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest computed in the manner and amount prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[6]

[6]See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717-721 (1962).

Upon the foregoing findings of fact, conclusions of law and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[7]

ORDER

The Respondent, Catalytic, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Suspending and discharging employees from engaging in concerted activities protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the purposes of the Act:

(a) Offer Phillip Lang and Samuel D. Thrash, Jr. immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without loss of seniority or other rights and privileges, and make them whole for any loss of earnings suffered by reason of Respondent's discriminatory action against them in accordance with the provisions of the section entitled "The Remedy" above.

(b) Preserve and, upon request, make available to the Board or its agents, payroll and other records to facilitate the effectuation of the Order herein.

(c) Post at its Wilsonville, Alabama place of business copies of the attached notice marked "Appendix."[8] Copies of

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[7]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[8]In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELA-

said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's duly authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated Washington, DC October 20, 1981.

/s/ HUTTON S. BRANDON

Hutton S. Brandon
Administrative Law Judge

TIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Office - Supreme Court, U.S.
FILED
APR 13 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1061

In the Supreme Court of the United States

OCTOBER TERM, 1983

CATALYTIC, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF AUTHORITIES

Page

Cases:

Associated Grocers of New England v. *NLRB*, 562 F.2d 1333 3

Bachrodt Chevrolet Co. v. *NLRB*, 411 U.S. 912 3

Clear Pine Mouldings, Inc., 268 N.L.R.B. No. 173 (Feb. 22, 1984) 3, 4

FTC v. *Sperry & Hutchinson Co.*, 405 U.S. 233 3

Local 542, International Union of Operating Engineers v. *NLRB*, 328 F.2d 850, cert. denied, 379 U.S. 826 3

NLRB v. *W.C. McQuaide, Inc.*, 552 F.2d 519 ..... 2, 3

SEC v. *Chenery Corp.*, 318 U.S. 80 3

Woodkraft Division/Georgia Kraft Co. v. *NLRB*, cert. granted, No. 83-103 (Nov. 14, 1983), vacated and remanded (Mar. 26, 1984) 3

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

§ 8a(1), 29 U.S.C. 158(a)(1) 2

§ 8a(3), 29 U.S.C. 158(a)(3) 2

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. In August 1980, respondent International Brotherhood of Electrical Workers, Local Union 136, began a strike against petitioner, following unsuccessful negotiations for a collective bargaining agreement. On August 30, striking employee Samuel Thrash telephoned the home of Sanford Simon, an employee who was continuing to work during the strike (Pet. App. A17-A18). Simon's wife answered the telephone and Thrash, without identifying himself, called her a "God damned bitch" and hung up (Pet. App, A18-A19 & n.2). The call was traced to Thrash and he was arrested on September 9 for making a harassing communication (Pet. App. A19).[1] He pleaded guilty and was

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[1]Simon, having received several harassing telephone calls, had a tracer put on his line prior to Thrash's call (Pet. App. A19).

fined $110. Thash was discharged by petitioner on September 11 for his alleged misconduct in making the phone call. The strike ended on September 17, 1980, and all but he and one other striking employee were reinstated.[2]

2. The Board, adopting the findings of the administrative law judge, concluded that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by refusing to reinstate Thrash at the conclusion of the strike. The Board found that Thrash's behavior during the strike "did not rise to the level of misconduct so violent or serious as to render him unfit for further service" (Pet. App. A10 n.2). The Board noted that Thrash's misconduct "was limited to a single, brief, anonymous telephone call which, while profane and vulgar, contained no threats of any kind and * * * was not violent in character" (*ibid.*). In addition, the Board found that Thrash's call was not "related to or part of any plan of harassment directed at non-striking employees" (*ibid.*).[3] The Board ordered that Thrash be offered reinstatement (Pet. App. A28). The court of appeals enforced the Board's order in an unpublished per curiam decision (Pet. App. A8).

3. Petitioner contends (Pet. 7) that the Board and the court of appeals erred by failing to apply to the strike misconduct at issue here the *McQuaide* standard adopted by the First and Third Circuits, *i.e.*, " 'whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the

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[2]In addition to Thrash, one other striker, Phillip Lang, was suspended and later discharged for alleged misconduct during the strike (Pet. App. A18). The issue of his discharge is not before this Court (Pet. 5 n.3).

[3]Although there was evidence that Simon had received other harassing calls during the strike (see note 1; *supra*), the Board found that there was no basis for concluding that Thrash was responsible for, or even aware of, any other calls (Pet. App. A10 n.2).

exercise of rights protected under the Act.' " *NLRB* v. *W.C. McQuaide, Inc.*, 552 F.2d 519, 528 (3d Cir. 1977) (quoting *Local 542, International Union of Operating Engineers* v. *NLRB*, 328 F.2d 850, 852-853 (3d Cir.), cert. denied, 379 U.S. 826 (1964)); *Associated Grocers of New England* v. *NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977). At the time the petition in this case was filed, the question whether *McQuaide* was the appropriate legal standard for assessing strike misconduct was before this Court in *Woodkraft Division/Georgia Kraft Co.* v. *NLRB*, cert. granted, No. 83-103 (Nov. 14, 1983), vacated and remanded (Mar. 26, 1984). However, on February 22, 1984, the Board issued a supplemental decision in *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. No. 173, in which it expressly adopted the *McQuaide* standard for determining whether statements by strikers to nonstriking employees justify an employer's refusal to reinstate. The Board stated that, in accordance with its usual practice, it would apply the *McQuaide* standard "to all pending cases in whatever stage" (268 N.L.R.B. No. 173, at 8 n.14). On March 26, 1984, this Court granted the motion of the Solicitor General, on behalf of the Board, to vacate the judgment of the court of appeals in *Georgia Kraft* and to remand the case to the Board for reconsideration in light of *Clear Pine Mouldings*.

Because the Board has adopted for this and future cases the *McQuaide* standard, which petitioner contends is the proper one, this case, like *Georgia Kraft*, no longer presents a legal issue warranting resolution by this Court. The only issue that remains is the application of the *McQuaide* standard to the facts of this case. That is a task which should be performed by the Board in the first instance. See *Woodkraft Division/Georgia Kraft Co.* v. *NLRB*, *supra*; *Bachrodt Chevrolet Co.* v. *NLRB*, 411 U.S. 912 (1973); *FTC* v. *Sperry & Hutchinson Co.* 405 U.S. 233, 245-250 (1972); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

Accordingly, we believe the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals insofar as it pertains to Samuel Thrash, and remand the case to the court of appeals with directions to remand it to the Board for reconsideration in light of *Clear Pine Mouldings Inc.*, 268 NLRB No. 173 (Feb. 22, 1984).

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board

APRIL 1984

DOJ-1984-04